

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
September 29, 2011

In the Matter of STAWASZ, Minors.

No. 301869
Ionia Circuit Court
Family Division
LC No. 2008-000145-NA

Before: GLEICHER, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Nearly three years after his minor daughters were taken into foster care, the respondent-father failed to demonstrate an ability to follow through with and benefit from services, remained unemployed, and lacked stable housing. Respondent was incarcerated throughout most of the child protective proceedings and was “gone with the wind” during his short stints of freedom. Because of the instability in his life and his failure to rectify the conditions identified by care workers, the trial court terminated respondent’s parental rights pursuant to MCR 712A.19b(3)(c)(ii), (g), and (j). Contrary to respondent’s challenges, the trial court made admirable attempts to provide him with every procedural protection and refused to allow the Department of Human Services (DHS) and Lutheran Children and Family Services (LCFS) (collectively petitioners) to seek termination until they had made reasonable efforts to reunify the children with their father. Petitioners established at least one statutory ground for termination by clear and convincing evidence and proved that termination was in the children’s best interests. Accordingly, we affirm the trial court’s decision to terminate respondent’s parental rights.

I. BACKGROUND

Respondent and the children’s mother¹ had three daughters together: R (born February 13, 2003), D (born November 26, 2005) and M (born October 8, 2007). The parties shared an enjoyment of drug and alcohol abuse, often leading to incidents of domestic violence, which sometimes occurred in the presence of the children. The parties separated in May 2007, and respondent has not seen his children since January 2008. In January 2008, the children’s mother secured a personal protection order (PPO) against respondent. By April 2008, respondent had violated the PPO and was incarcerated in the Ionia County Jail.

¹ The children’s mother voluntarily released her parental rights in June 2010.

The family had already been receiving social services for some time with the goal of maintaining the children in their mother's home. On April 16, 2008, however, the DHS filed an initial petition for jurisdiction and took the children into custody, alleging that the mother left the children with inappropriate caregivers while she abused drugs and alcohol. The DHS alleged that respondent had two prior convictions for domestic violence against the children's mother, was currently incarcerated for domestic violence, and the children had witnessed violence in the home. The court assumed jurisdiction over the children based on the mother's admission to the allegation of substance abuse.

Petitioners attempted to provide reunification services to respondent following his release from jail. However, from July 3, 2008 through January 14, 2009, no one knew respondent's whereabouts. Respondent failed to contact his foster care case worker, the court, or his appointed counsel. Respondent only resurfaced when he was arrested and ultimately imprisoned for stealing a motor vehicle. Following respondent's reappearance, the court appointed new counsel to represent him and petitioners assigned a new foster care case worker. While in prison, respondent participated in various prison-required rehabilitative services and personally sought out parenting classes. Petitioners twice attempted to file a petition to terminate the imprisoned respondent's parental rights, but the court refused.

Upon respondent's ultimate release from prison on July 29, 2010, his foster care case worker scheduled his appointments for parenting classes, a psychological evaluation, and a substance abuse evaluation. Respondent either failed to appear or cancelled all of these services without attending any rescheduled appointments. He failed to appear for his scheduled meeting with the foster care worker and absconded from parole by failing to report. On September 11, 2010, respondent violated a no-contact provision of his parole by sending the children's mother a threatening message on Facebook. By September 22, 2010, respondent was back in jail because of his parole violations.

Based on respondent's complete failure to follow through with services after his release, despite the ardent promise he made while imprisoned to do anything necessary to regain contact with his children, the court authorized the petitioners to file a petition to terminate respondent's parental rights. At the two-day termination hearing, petitioners presented evidence that R suffered from post-traumatic stress disorder from witnessing her father physically abuse her mother, D did not remember respondent as her father, and M had no meaningful contact with her father during her young life. Petitioners acknowledged that respondent had completed assaultive offender and substance abuse therapy as well as parenting classes while in prison. Yet, respondent showed a complete lack of responsibility in the real world, failing to keep scheduled appointments, to follow through on services or even to report as necessary on parole. Respondent then resided in a "half-way" facility and still had not secured employment, stable housing, or initiated required services. He also had not undergone a required psychological evaluation to secure supervised parenting time with his children.

Based on the evidence presented during the termination hearing, the court terminated respondent's parental rights under the following provisions of MCL 712A.19b(3):

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

* * *

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

Regarding all three statutory grounds, the court noted that respondent had "totally turned [his] back on [offered] services." Respondent had been notified of petitioner's concerns about his substance abuse, emotional stability, mental health, parenting skills, history of domestic violence, and lack of employment and suitable housing. Yet, respondent was not motivated to rectify these conditions despite having many services arranged for him. Moreover, respondent had made no realistic plan for independent living. Noting the length of time the children had already been in foster care, the court found, "There's just no reasonable likelihood that these plethora of conditions will be rectified within a reasonable time when we consider the ages of these children," supporting termination under subsection (c)(ii). Similarly, the court determined that respondent would be unable to provide proper care and custody for the children within a reasonable time, sustaining termination under subsection (g). Given respondent's failure to benefit from services and the lack of a parent-child bond, the court found that the children would likely suffer emotional harm if placed in their father's care, justifying termination under subsection (j).

The court also determined that termination was in the children's best interests as respondent had never submitted to a psychological examination and did not comply with the treatment plan outlined in his case service plan. Respondent had made no attempt to earn parenting time with his children causing the lack of a parent-child bond. The court also noted respondent's history of domestic violence and his most recent parole violation stemming from yet another incident of threatening the children's mother.

II. DUE PROCESS

On appeal, respondent asserts that he was deprived of due process of law by several irregularities in the proceedings. In general, we review for clear error a trial court's findings of fact regarding the statutory grounds for termination and the children's best interests. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009) (Corrigan, J.). Whether a respondent has been deprived of his right to due process, however, is a constitutional issue that we review de novo. *Id.* at 91. Due process demands notice and an opportunity to be heard as well as fundamental fairness. *Id.* at 92. Respondent's due process challenges focus on various violations of statutes and court rules. The proper interpretation and application of statutes and court rules is a legal question, which we also review de novo. *Henry v Dow Chemical Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *Estes v Titus*, 481 Mich 573, 578; 751 NW2d 493 (2008).

Respondent challenges the court's failure to appoint counsel to represent him at the April 16, 2008 preliminary hearing. Both respondent and the mother were notified of this proceeding, but respondent did not attend because he was in jail. Pursuant to MCR 3.915(B)(1), the court must advise a respondent in a child protective proceeding that he has the right to appointed counsel. This advice must be given "[a]t respondent's first court appearance." Although respondent was not present at the April 16 hearing, the court informed him in writing that he could contact the court and request appointed counsel before the next hearing. Respondent requested counsel and the court appointed an attorney on April 18, 2008. The court did more than required under the court rules to provide respondent with appointed counsel. Accordingly, we find no due process violation in this regard.

The court did err, however, by allowing attorney Darrell Fahey to stand in for respondent's appointed counsel at the July 31, 2008 dispositional review hearing. Fahey was associated with the same law firm as the children's guardian *ad litem*. MRPC 1.7(a)(2) prohibits an attorney from representing two clients with directly adverse interests unless "each client consents after consultation." For purposes of the conflict rules, attorneys working for a single law firm are treated as one entity. MRPC 1.10(a). Fahey admitted on the record that no one had consulted respondent to secure his waiver of the conflict. Despite that, the court allowed the proceeding to continue with Fahey acting as respondent's counsel. This violation of MRPC 1.7(a) did not deprive respondent of his right to due process. Fahey represented respondent in one hearing during the three-year child protective proceedings. At that hearing, the court made no decisions affecting respondent's rights.

Respondent also challenges the trial court's decision to dismiss his first appointed counsel at the October 22, 2008 dispositional review hearing. As noted, respondent disappeared after his July 3, 2008 release from jail. Respondent made no contact with the court, petitioners or his attorney and attempts to locate respondent were unsuccessful. The court therefore relieved respondent's appointed attorney of his duties. We find *In re Hall*, 188 Mich App 217; 469 NW2d 56 (1991), instructive in concluding that the court's action does not require reversal.

During a dispositional hearing, the trial court in *Hall*, 188 Mich App at 219, "relieved [the respondent's appointed counsel] of his duties after [he] advised the court that he did not know his client's whereabouts, had not been in contact with her for over sixteen months, and did not know her wishes." This Court relied on the former MCR 5.915(B)(1), which, like the current

MCR 3.915(B)(1), required a respondent to request the appointment of counsel in a child protective proceeding, the appointment was not automatic. *Hall*, 188 Mich App at 221. As a respondent has a duty to request counsel, a respondent may also “‘waive[]’ or relinquish[] that right.” *Id.* at 222. “[A]n ongoing attorney-client relationship is essential to the continuation of appointed counsel. Here, respondent effectively terminated the attorney-client relationship, thereby ‘waiving’ or relinquishing her right to counsel until such time as she reasserted her right.” *Id.* This Court further determined that any error in this regard was harmless. The court reappointed counsel when requested by the respondent and counsel was able to refute evidence that had been presented in the interim. *Id.* at 222-223.

Here, respondent failed to maintain “an ongoing attorney-client relationship” and thereby relinquished his right to counsel as in *Hall*. Respondent failed to show prejudice as no evidence was presented against him in the interim and the court appointed new counsel for respondent upon his reappearance in the proceedings. Accordingly, any potential error was harmless.

The trial court and appointed counsel also erred in failing to facilitate respondent’s participation by telephone in the May 13 and May 22, 2008 dispositional review hearings. At the time these hearings were held, respondent was housed in a county jail. MCR 2.004(C) provides that a trial court presiding over a child protective proceeding must “issue an order requesting the [Department of Corrections (DOC)], or the facility where the party is located if it is not a department facility, to allow that party to participate . . . by telephone.” The court and the father’s attorney were under the mistaken impression that this court rule applies only to respondents serving time in prison. To the contrary, the court rule applies to a respondent housed in a prison or non-DOC facility, such as a county jail. We find no error requiring reversal in this regard given the trial court’s admirable efforts later in the proceedings to safeguard respondent’s rights.

We agree with respondent’s assertion that petitioners failed, on several occasions, to timely provide reports and service plans to him, his attorney, and the court. MCL 712A.18f(1) and (2) require petitioners to prepare written reports and updated case service plans to keep the court apprised of the services provided to the family. During the dispositional phase, these reports must be updated every 90 days and the court is required to review them before entering any dispositional order. MCL 712A.19b(2), (4); MCR 3.973(E)(2). The respondent is entitled to review any agency report submitted to the court and to cross-examine an agency official regarding that evidence. MCL 712A.19(11); MCR 3.973(E)(3). Yet, the trial court adequately remedied the harm caused by petitioners and respondent was not deprived of due process. The court adjourned one hearing to allow respondent to adequately review documents omitted by petitioners. And, the court twice fined LCFS for its failure to timely produce adequate agency reports and case service plans.

Finally, we reject respondent’s contention that he was denied due process when the court suspended his right to parenting time in the initial adjudicative order. MCL 712A.13a(11) provides that a court “shall permit” frequent parenting time when a child is removed from his parent’s care. The statute provides an exception:

If parenting time, even if supervised, may be harmful to the juvenile, the court shall order the child to have a psychological evaluation or counseling, or both, to

determine the appropriateness and the conditions of parenting time. The court may suspend parenting time while the psychological evaluation or counseling is conducted.

MCR 3.965(C)(6)(a) similarly provides:

Unless the court suspends parenting time pursuant to MCL 712A.19b(4) [suspension of parenting time when the petition to terminate filed at initial dispositional hearing], or unless the child has a guardian or legal custodian, the court must permit each parent frequent parenting time with a child in placement unless parenting time, even if supervised, may be harmful to the child.

Here, the trial court properly determined at the beginning of these proceedings that even supervised parenting time between respondent and his children “may be harmful.” In April 2008, respondent was in jail for violating a PPO and committing domestic violence against the children’s mother. Respondent had been incarcerated on two prior occasions for domestic violence. The children had witnessed domestic violence in their home. Further, the court did not permanently suspend respondent’s rights to parenting time. Rather, the court ordered respondent to undergo a psychological evaluation to gauge whether he posed a threat to the children and ordered the children’s therapist to advise when they were emotionally ready for parenting time. Respondent still had not undergone a psychological evaluation by the time of the termination hearing. Accordingly, he never proved that parenting time would not be harmful to his children.

III. PREMATURE TERMINATION

Respondent further asserts that the trial court prematurely terminated his parental rights because petitioners had not provided adequate services, assistance and opportunity to allow him to work toward reunification. As a result, respondent contends that petitioners could not truly provide clear and convincing evidence that a statutory ground for termination existed.

In *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010), our Supreme Court held, “The state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated. . . . ‘Reasonable efforts to reunify the child and family must be made in *all* cases’ except those involving aggravated circumstances not present in this case. MCL 712A.19a(2).” (Emphasis in original.) In *Mason*, petitioner had not evaluated, provided services to, or even contacted the incarcerated respondent-father before the court terminated his parental rights. *Id.* at 156. The petitioner completely failed in its statutory duties to the incarcerated respondent. *Id.* at 156-157. Accordingly, the Court found termination premature under MCL 712A.19a(6)(c), which provides that the court need not order termination proceedings if “[t]he state has not provided the child’s family, consistent with the time period in the case service plan, with the services the state considers necessary for the child’s safe return to his or her home, if reasonable efforts are required.” Ultimately, the trial court was required to reconsider its termination decision after the petitioner provided reunification services to the respondent-father. *Mason*, 486 Mich at 168. Specifically, the Court held, “a court may not terminate parental rights on the basis of ‘circumstances and missing information directly attributable to respondent’s lack of meaningful prior participation.’” *Id.* at 159-160, quoting *In re Rood*, 483 Mich 73, 119; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.).

The trial court in this proceeding paid careful attention to the Supreme Court's directions in *Mason*. On two separate occasions, the trial court refused to authorize the petitioners to file a termination petition because they had not provided respondent with services toward reunification. Respondent was aware that his children had been in foster care for nearly 2-1/2 years when he was finally released from prison and that, because of this delay, he was required to immediately begin services to prove his dedication toward reunification. Instead of complying with his case service plan, respondent disappeared into the ether. His LCFS foster care case worker had scheduled all his necessary service appointments and communicated with respondent both face-to-face and through e-mail to confirm these appointments. Respondent failed to attend any of his scheduled appointments and participated in no services. He missed a meeting with his case worker and failed to report on parole.

Respondent's children had been in care for almost three years by the time of the termination hearing. The court repeatedly emphasized petitioners' obligation to do everything possible to reunify respondent with his daughters. Given respondent's pattern of working toward reunification while incarcerated, and completely failing to address his goals upon release, the court had more than clear and convincing evidence to terminate his parental rights under all three cited statutory grounds. Respondent's behavior proved that he would not be able to rectify the conditions preventing reunification within a reasonable time, nor would he be able to provide proper care and custody. Moreover, based on respondent's "conduct or capacity," the court correctly determined that there was a reasonable likelihood of at least emotional harm to the children if returned to their father's care.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens